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No. 10-728

Supreme Court, U.S.
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In The

# Supreme Court of the United States

RALPH NADER, PETER MIGUEL CAMEJO, ROBERT H. STIVER, MICHAEL A. PEROUTKA, CHUCK BALDWIN, AND DAVID W. PORTER,

*Petitioners,*

v.

SCOTT T. NAGO, CHIEF ELECTION OFFICER, STATE OF HAWAII,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether, in applying *Jenness v. Fortson*, 403 U.S. 173 (1971), the Ninth Circuit correctly held that Hawaii's imposition of a reasonable one percent signature requirement on independent candidates who wish to appear on the presidential ballot does not impose a severe burden, under the equal protection clause of the United States Constitution, on independent candidates for president either alone or in comparison to the route qualified party candidates must take.

## PARTIES TO THE PROCEEDINGS

The following are the parties to the proceedings in the court below:

Plaintiffs-Appellants-Petitioners

Ralph Nader

Peter Miguel Camejo

Michael Peroutka

Chuck Baldwin

David W. Porter

Robert H. Stiver

Defendant-Appellee-Respondent

Scott T. Nago, Chief Election Officer, State of Hawaii*

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* Chief Election Officer Kevin B. Cronin resigned during the underlying proceedings, effective December 31, 2009, and was subsequently replaced by Chief Election Officer Scott T Nago on January 1, 2010. Pursuant to Supreme Court Rule 35, Chief Election Officer Scott T. Nago is automatically substituted as a party, and the Clerk has been notified in writing of the succession in office.

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## BRIEF FOR RESPONDENT IN OPPOSITION

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The following relevant Hawaii statutes, not already cited in petitioner's brief, are set out as follows:

**Haw. Rev. Stat. § 11-61:**

**"Political party" defined.** (a) The term "political party" means any party which has qualified as a political party under sections 11-62 and 11-64 and has not been disqualified by this section. A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county other than Kalawao.

(b) Any party which does not meet the following requirements or the requirements set forth in sections 11-62 to 11-64, shall be subject to disqualification:

(1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraph (2) whose terms had expired. This does not include those offices which were vacant because the incumbent had died or resigned before the end of the incumbent's term; and

(2) The party received at least ten per cent of all votes cast:

(A) For any of the offices voted upon by all the voters in the State; or

(B) In at least fifty per cent of the congressional districts; or

(3) The party received at least four per cent of all the votes cast for all the offices of state senator statewide; or

(4) The party received at least four per cent of all the votes cast for all the offices of state representative statewide; or

(5) The party received at least two per cent of all the votes cast for all the offices of state senate and all the offices of state representative combined statewide.

**Haw. Rev. Stat. § 14-21:**

**Nomination of presidential electors and alternates; certification; notification of nominees.** In each year when electors of president and vice president of the United States are to be chosen, each of the political parties or parties or groups qualified under section 11-113 shall hold a state party or group convention pursuant to the constitution, bylaws, and rules of the party or group; and nominate as candidates for its party or group as many electors, and a first and second alternate for each elector, of president and vice president of the United States as the State is then entitled. The electors and alternates

shall be registered voters of the State. The names and addresses of the nominees shall be certified by the chairperson and secretary of the convention of the respective parties or groups and submitted to the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election of the same year. The chief election officer upon receipt thereof, shall immediately notify each of the nominees for elector and alternate elector of the nomination.

## I. STATEMENT OF THE CASE[1]

1. In 2004, petitioners Ralph Nader and Peter Miguel Camejo sought to run as **independent candidates** on the same ballot for the Offices of President and Vice President respectively. Petitioners Michael Peroutka and Chuck Baldwin, likewise, sought to run, as **independent candidates**, for the Offices of President and Vice President. Petitioners' names were not included on the State of Hawaii's presidential election ballot, however, because they failed to successfully complete the application and petition requirements for independent presidential candidates, as required pursuant to Hawaii Revised Statutes ("Haw. Rev. Stat.") § 11-113(c)(2). Namely, petitioners were unable to submit petitions that contained the signatures of currently registered voters

[1] The following Statement of the Case elaborates upon the statutory framework for obtaining placement on the general election ballot for the offices of president and vice president

that constituted not less than one percent of the votes cast in the State of Hawaii at the last (2000) presidential election. *Id.* One percent of the 371,033 votes cast at the 2000 election equated to 3,711 signatures. In accordance with Hawaii Revised Statutes § 14-21, petitioners had until 4:30 p.m. on the **sixtieth day** prior to the general election to submit their petitions: the cut off date for petitioners' submission was thus **September 3, 2004**. Pet. for Writ of Certiorari, App. C (USDC Haw. Order – Feb. 7, 2008) at 18a.

Petitioners agree that "the valid signatures submitted by both campaigns were insufficient to obtain ballot access pursuant to Hawaii Revised Statutes § 11-113." Pet. at 5.

2. Pursuant to Hawaii law, the only other way petitioners could have qualified for inclusion on the general election ballot was to be designated as a candidate by a **qualified state political party**. It is undisputed that petitioners were not (nor were they affiliated with) qualified state political parties. The term "political party" is defined by Hawaii law as "an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, *including a regularly constituted central committee and county committees in each county* . . . " Haw. Rev. Stat. § 11-61(a) (emphasis added).

Hawaii Revised Statutes § 11-62 requires any group desiring to qualify as a political party to file a

petition with the State's chief election officer no later than 4:30 p.m. on the **one hundred seventieth day prior to the next State primary election**. The deadline to file a petition to qualify as a political party, with respect to the 2004 general presidential election, was thus **April 1, 2004**. Pet., App. C (USDC Hawaii Order – February 7, 2008) at 18a. The petition must contain, among other things, the signatures of currently registered voters constituting no less than one-tenth of one percent of the total registered voters in the State as of the last preceding general election, the names and addresses of the officers of the central committee and the county committees of the political party, and the party rules. Haw. Rev. Stat. § 11-62(a). One-tenth of one percent of the 676,242 voters registered for the 2002 general election, equated to 677 petition signatures. *Id.*

The process by which qualified state political parties obtain placement of their presidential and vice presidential candidates on the ballot is governed by Haw. Rev. Stat. § 11-113(c)(1). Specifically, the political party must file a sworn application with the chief election officer, including, among other information, "A statement that the candidates are the duly chosen candidates of **both the state and the national party**,[2] giving the time, place, and manner of the

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[2] "National party" is defined as "a party established and admitted to the ballot in at least one state other than Hawaii or one which is determined by the chief election officer to be making a bona fide effort to become a national party." Haw. Rev.

(Continued on following page)

selection." Haw. Rev. Stat. § 11-113(c)(1)(C) (emphasis added).

3. The pre-1999 laws governing the petition signature requirements of political parties, which petitioners reference throughout their brief, are entirely irrelevant to the matter before this Court. Petitioners challenge only the **present** laws (identified earlier in this section, and discussed further in this brief) governing ballot access for *independent* candidates for president, as juxtaposed with the **present** laws governing the requirements for the formation of a qualified state *political party,* and becoming that party's ballot candidate for president.

## II. SUMMARY OF ARGUMENT

There are two separate and distinct ways a candidate can qualify for inclusion on the general election presidential ballot in Hawaii: (1) as a candidate designated by a *qualified state political party*, in conjunction with a national party; and (2) as an *independent candidate*. Haw. Rev. Stat. § 11-113(c)(1) & (2). It is undisputed that petitioners chose to run for office as independent candidates. In order to obtain placement of their party candidate on the ballot, a

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Stat § 11-113(b) In the event that there is no national party, or disagreement between the national and state parties (or factions within the parties), as to the presidential and vice presidential candidates, "the chief election officer may determine which candidates' names shall be placed on the ballot **or may leave the candidates' names off the ballot completely.**" *Id*

qualified state political party must obtain one-tenth of one percent of the vote at a prior election, whereas independent candidates must obtain petition signatures of registered voters representing one percent of the total number of votes cast during the previous election.

Respondent has never disputed that Hawaii law requires independent candidates to obtain a greater number of petition signatures than is required for the formation of qualified state political parties. However, the increased petition signature requirement upon independent candidates is offset by two important factors that are ignored by petitioners: (1) the later petition filing deadline for independent candidates, that provides independent candidates with 5 extra months to gather the necessary petition signatures, Haw. Rev. Stat. §§ 11-62 and 11-113(c)(2), and (2) the significant burden upon a political party and/or its candidate, not applicable to independent candidates, to first establish the party, and then be selected, among a potentially large pool of contenders, as that party's singular candidate. As a result of these offsets, the overall burden upon independent candidates, such as petitioners, is *not* any greater than the burden upon new party candidates. Indeed, as a result of these offsets, the burden upon independents is arguably ***less*** onerous than the burden on political parties.

Thus, petitioners have failed to prove that the imposition of different petition requirements on independent candidates is inherently more burdensome, and thus *Jenness v. Fortson*, 403 U.S. 431 (1971), as

the Ninth Circuit held, is the dispositive case on point. 403 U.S. at 440-41 (rejecting Equal Protection challenge where state "mak[es] available . . . two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.") The State's interests of avoiding voter confusion and the overcrowding of the ballot, by requiring independent candidates to demonstrate a minimal level of voter support (amounting to a mere one percent of the total votes *cast* at the prior election), sufficiently justify the separate petition requirements imposed upon independent candidates. *Storer v. Brown*, 415 U.S. 724, 733 (1974); *Jenness*, *supra*.

Petitioners' argument that the Ninth Circuit failed to apply *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), and the lower court cases that apply its holding has no merit. In *Socialist Workers Party*, this Court applied the strict scrutiny standard to strike down a law requiring new party and independent candidates running for an office of a *political subdivision* (i.e., the county Mayor's seat) to obtain **more** petition signatures than those candidates seeking *statewide* office. That fact, not present in the case at bar, meant that Illinois' higher signature requirement for *local* office could not possibly have been necessary to achieve Illinois' goal of avoiding overcrowded ballots, when a lesser signature requirement was, at the same time, sufficient for *statewide* offices. Here, unlike in *Socialist Workers Party*, petitioners do not contend that candidates running for a local county office were subject to greater

petition signature requirements than those candidates for U.S. president. Their gripe is that *qualified state political parties*, which nominate a candidate to run in the same statewide election, are not subject to the exact same petition signature requirement as independents. This Court did not address that issue in *Socialist Workers Party*; it did, however, address that issue, in respondent's favor, in *Jenness*.

This Court should thus deny the petition for writ of certiorari as existing Supreme Court precedent forecloses petitioners' claim, and no Circuit conflict exists.

## III. ARGUMENT

At the outset, the State clarifies two mischaracterizations by petitioners:

1. Petitioners falsely suggest that *Jenness* is inapplicable because independents there were compared with *major* political parties, and not with *minor* political parties (or so-called "presidential cycle new parties"). But nothing in *Jenness* suggests any such distinction because, as *Jenness* found conclusive, neither "alternative path" – whether comparing independents with major *or* minor political parties – was "inherently more burdensome than the other." 403 U.S. at 440-41. Because minor political party candidates must meet the earlier signature deadline and are faced with the burdens of both establishing a party and being selected as its nominee, the path for

*independent* candidates, who do not face those difficulties, is *not* inherently more burdensome.[3]

Petitioners also confuse things by suggesting in the first clause of their Question Presented that they are also objecting to small *parties* being forced to run as independents. But petitioners have no standing to raise that objection. Petitioners are **independent candidates**, *not* political party candidates, small or large. Petitioners deliberately seek to confuse this Court by arguing that Hawaii law treats "presidential cycle new parties" (which petitioners neither are, nor have any affiliation with) differently than major political parties. They have no standing to make that argument, and that argument fails in any event. *See* footnote 3, *supra*.

2. This Court does not automatically apply the strict scrutiny test to election laws. As this Court has recognized,

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[3] While certain "major" parties in Hawaii may sometimes avoid some of these burdens, *see* Haw Rev Stat. § 11-62(d) (allowing party to qualify for ten-year period under certain circumstances), such qualification requires meeting additional other burdens, including either qualifying by petition for three consecutive general elections, or receiving a certain percentage of votes cast in the last general election (*see* Haw. Rev. Stat. §§ 11-62(d) and 11-61(b)(2)-(5)) *See American Party of Texas v White*, 415 U.S. 767, 782-83 (1974) ("so long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner").

> Election laws will invariably impose some burden upon individual voters. . . .
>
> * * *
>
> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently . . . Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."

*Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

This Court does not apply a "litmus-paper test" in reviewing constitutional challenges to specific provisions of State election laws. Rather, it applies the following two-part analysis: (1) "consider[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; and (2) "identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed by its rule," by "determin[ing] the legitimacy and strength of each of those interests" . . . and "consider[ing] the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1993) (citations omitted).

### A. Independent Candidates Are Not Faced With More Severe Overall Burdens Than Political Party Candidates

Here, petitioners chose to obtain access to the 2004 election ballot as independent candidates. This required them to submit a petition with 3,711 petition signatures. The mere fact that new prospective political parties – which to even be recognized must meet substantial unique obligations – were required to submit a petition containing only 677 signatures, but by a much earlier April 1, 2004 deadline, does not raise equal protection concerns.

The difference between 3,711 and 677 petition signatures is more than offset by two main factors: (1) the over 5 month later deadline[4] for an independent candidate to gather the necessary signatures, *compare* Haw. Rev. Stat. § 11-62(a)(1) *with* Haw. Rev. Stat. § 11-113(c)(2), which includes the time period when late-emerging issues have arisen, and when the *parties'* chosen candidates will likely be known (leaving fewer viable *general* election choices for voters), thus making it even easier for an independent to obtain signatures; and (2) the difficult burden, not applicable to independent candidates, to actually establish a political party, Haw. Rev. Stat. §§ 11-61(a) and 11-62 (requiring, *inter alia*, names and addresses

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[4] Due to the change in the date of the primary election, *supra* footnote 4, the additional time in the upcoming presidential election cycle would be over 6 months, as opposed to the 5 months in 2004

of the officers of the party's central committee and county committees, and the party's rules), *and* become the chosen candidate, among potentially many other contenders, of that party. *See* Haw. Rev. Stat. § 11-113(c)(1)(C) (requiring, among other things, that the candidate be "the duly chosen candidate[ ] of both the state and the national party, giving the time, place, and manner of the selection.")

With those two offsets, one cannot say that the *overall* burden upon independent candidates like petitioners is any greater than the burden upon new party candidates. Indeed, as explained in more detail later, the burden upon independents is, if anything, arguably less than the burden on political party candidates when those two offsets are considered. The petition simply ignores or wrongly dismisses these two major offsets.

As to the first offset, the later deadline, the petition argues that the statutory history -- showing that prior to 1999, although the relative deadlines were as they are today, political parties had to obtain signatures in a much greater percentage (one percent) as compared to today (one-tenth of one percent), i.e., even more than independent candidates (given that registered voters, not votes cast, was the relevant pool for political parties) -- undermines the notion that today's lower percentage for political party candidates (and conversely, higher percentage for independent parties) is offset by the earlier deadline for political party candidates, since before 1999 the relative deadlines were the same (i.e., same 5 month differential)

and yet political parties had to then get petition signatures of a full one percent of registered voters. This argument fails because that statutory history does *not* undermine the State of Hawaii's deadline differential argument. Instead, that statutory history simply reflects that prior to 1999 independent candidates were treated way more favorably than political party candidates. The fact that the State of Hawaii in 1999 lowered the signature requirement for political parties simply brought the two different types of candidacies back into a somewhat more equal alignment, whereby, as noted above, the difficulties political party candidates have (relative to independent candidates) in meeting the earlier deadline, and the burdens of establishing a party, and being the chosen nominee of that party, are partially offset by the new lower signature requirement.

This fully explains, therefore, the legislative history statements, that petitioners emphasize twice in **bold** face in their petition at pages 13-14, that "The purpose of this bill is to make it easier for a political party to qualify and operate in Hawaii." Rather than that statement reflecting a purported discriminatory intent as petitioners claim, it actually reflects merely a *lessening* of the prior overall *disadvantage* political parties were subjected to, and the creation of a system that treats independent candidates and political party candidates somewhat more equally, though still with an arguable overall edge in favor of independent candidates.

In regards to the second offset, it should be emphasized that in addition to obtaining the necessary signatures, the group seeking to form a party must create a central committee and county committees in addition to developing party rules as part of their petition. Haw. Rev. Stat. §§ 11-61(a) and 11-62(a)(4). This infrastructure requires more than an isolated campaign in the most populous county, which is the City and County of Honolulu, but requires the development of membership and infrastructure across the state in the four primary counties. *Id.*

Moreover, after the party has been established, any candidate must be selected as that party's nominee, which often means defeating competing candidates in the party selection process. Independent candidates face no such obstacle.

Additionally, even if a group were to be recognized as a state political party, and presidential and vice presidential contenders successfully beat others who had competed for the nomination of the state political party, the contenders might still not be placed on the ballot unless there is agreement with the *national* party. Haw. Rev. Stat. § 11-113(b) and (c)(1)(C).

A national party would require the political party to be recognized in at least one *other* state, or the chief election officer determining that a bona fide

effort to become a national party is in progress.[5] Haw. Rev. Stat. § 11-113(b). This would mean that a new political party would have to comply with additional petition and other requirements that exist in another state.

Even assuming the political party is established in other states, it is not uncommon for the national party, composed of delegates from the other states' parties, to select a candidate different from that chosen by Hawaii's state political party. That could end up leaving all of the party's candidates off the ballot. *See*, footnote 5, *supra*.

In sum, considering all of these additional hurdles faced by political party candidates, it is not easier to form a state political party by an early deadline, establish a national party, and then be selected by both as the presidential and vice presidential candidates, as opposed to simply doing a focused independent presidential petition, in which once the signatures are obtained in the extended period of time provided, the names of the candidates on the petition will be placed on the ballot.

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[5] Hawaii Revised Statutes § 11-113(b) makes clear that where "there is no national party or the national and state parties . . . do not agree on the . . candidates, the chief election officer may . leave the candidates' names off the ballot completely."

### B. This Court's Holding In Jenness Is Entirely Dispositive

Given the above analysis showing that independent candidates are *not* overall more burdened than political party candidates, the Ninth Circuit's holding was an entirely correct and proper application of this Court's precedent in *Jenness v. Fortson*, 403 U.S. 431 (1971).

In *Jenness*, this Court upheld a Georgia law that required independent candidates (and nominees of political bodies that were not recognized by the state as political parties) to submit a petition containing the signatures of five percent of individuals registered to vote at the last general election. Similar to petitioners' argument here, the *Jenness* petitioners argued that Georgia's law violated Equal Protection because a recognized political party – defined by Georgia law as a political body that had received at least twenty percent of the vote at the last gubernatorial or presidential election – could nominate candidates through the purportedly "less burdensome" primary election process. *Id.*

The *Jenness* Court's reasoning in upholding the five percent signature requirement is entirely on point here:

> The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment fares no better. This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible

electorate than it is to win the votes of a majority in a party primary. That is a premise that cannot be uncritically accepted. . . .

* * *

The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. **We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.**

* * *

The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. **Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . .**

* * *

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

*Id.* at 440-42 (emphases added, footnotes omitted). As explained in *Jenness*, if Hawaii were to impose the same signature quantity requirement on both independent and political party candidates, it would be treating different things as though they were alike. For, as explained in the prior section, political party candidates face the unique burden associated with establishing a state and national party, and being selected as the party's agreed upon candidate.

Moreover, in *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court again acknowledged the appropriateness of alternative means of ballot access. Specifically, this Court upheld the state's imposition of the following alternative means of ballot access: (1) the nomination of major party[6] candidates through a primary election; (2) the nomination of

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[6] "Candidates of political parties whose gubernatorial candidate polled more than 200,000 votes in the last general election may be nominated by primary election only, and the nominees of these parties automatically appear on the ballot." *Id* at 772

medium party[7] candidates though a primary election or convention; (3) the nomination of small party candidates through precinct nominating conventions, or (if that process did not evidence the required support) a notarized petition signed by an amount equal to one percent of the total gubernatorial votes at the last general election; and (4) the nomination of independent or nonpartisan candidates through a notarized petition containing the signatures of five or three or one percent (depending on whether the office is a state, district, county, or precinct office) of the total number of gubernatorial votes at the last general election.[8]

With respect to their equal protection claim, the Court held that the *American Party of Texas* petitioners failed to meet their burden, under the Equal Protection Clause, of demonstrating "a discrimination against them of some substance." *Id.* at 781. "Appellant's burden is not satisfied by mere assertions that small parties must proceed by convention when major parties are permitted to choose their candidates by primary election. *The procedures are different, but the Equal Protection Clause does not necessarily forbid the one in preference to the other.*" *Id.* at 781-82

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[7] Candidates of parties whose candidate polled less than 200,000 votes, but more than two percent of the total vote cast for governor in the last general election may be nominated and thereby qualify for the general election ballot by primary election or nominating conventions *Id.* at 773

[8] If petitioner seeks to run for a district, county, or precinct office, his or her petition signature requirement is capped at 500 signatures *Id.* at 775, n 7

(*citing Jenness*, emphases added). The Court went on to note that "the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support. So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner." *Id.* at 782-83.

Here, as in *Jenness* and *American Party of Texas*, the State of Hawaii has statutorily established alternative routes by which a prospective presidential candidate may seek ballot access. Pursuant to *Jenness* and *American Party of Texas*, which are directly on point, the mere fact that petitioners, as independent candidates, were subject to a different method of ballot access is not violative of equal protection. As noted earlier, the higher signature requirement imposed on independent candidates is more than offset by the earlier deadline and the additional burdens imposed on political party candidates.

### C. Contrary to Petitioners' Contention, *Socialist Workers Party* and Its Progeny Are Entirely Distinguishable

Petitioners wrongly argue that the Ninth Circuit erred by not relying upon three cases, even though each can be easily distinguished as follows:

1. In *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), the issue was *not* whether the different ballot access requirements for political parties versus independent candidates were constitutional. The dispositive issue was whether different requirements for access to the ballot in a *statewide* election versus a *smaller political subdivision* election were constitutional. In *Socialist Workers Party*, this Court reviewed an Illinois law requiring both independent candidates and new political parties to obtain: (1) 25,000 signatures to appear on the ballot in a statewide race, but (2) five percent of the number of votes cast at the last Chicago election (or 35,947) to appear on the ballot in a local Chicago race. Given those facts, this Court held that the higher signature requirement for access to the ballot in a *city* election versus a *statewide* election violated equal protection. *Id.* at 186-87. That was because Illinois' higher signature requirement for a *city* office could not possibly have been necessary to achieve Illinois' goal of avoiding overloaded ballots, when a smaller signature requirement was apparently, at the same time, sufficient for *statewide* offices.

This Court, in *Socialist Workers Party*, implicitly distinguished that case from cases similar to *Jenness*, and the case at bar, by expressly recognizing that:

> [petitioners in *Socialist Workers Party*] do not attack the lines drawn between independent and established party candidates. Rather, their equal protection claim rests on the discrimination between those independent candidates and new parties seeking access to

> the ballot in *statewide* elections and those similarly situated candidates and parties seeking access in *city* elections.

440 U.S. at 181 (emphasis added). Petitioners' claim that *Socialist Workers Party* mandates application of strict scrutiny when the signature requirement for independent candidates is greater than the signature requirement for newly formed political parties, *see* Pet. at 24, is therefore wrong on its face.

2. In *Cromer v. South Carolina*, 917 F.2d 819 (4th Cir. 1990), the dispositive issue was whether the **simultaneous, pre-primary candidacy filing deadline** for independents and political parties unconstitutionally restricted access to the ballot. South Carolina's **200 day** pre-general election deadline, long before party primaries concluded, meant that independent candidates would not know against whom they would be running. *Id.* at 823. The court emphasized "the peculiar potential that independent candidacies have for responding to issues that only emerge during or after the party primary process," a potential that is "effectively precluded" by the 200 day pre-election deadline. *Id.* at 823. That extremely early deadline, the *Cromer* court noted, would "effectively cut[] off the opportunity for [independent] candidacies to develop at a time . . . during which reasons for their emergence are most likely to occur." *Id.* at 824.

In the present case, by sharp contrast, an independent candidate's deadline is only **sixty days** prior to the general election, Haw. Rev. Stat. §§ 11-62 and 11-113, which is on or *after* the presidential

party nominating conventions, by which time party general election candidates are likely known, and late-emerging issues have arisen. Indeed, the Fourth Circuit, in *Wood v. Meadows*, 117 F.3d 770 (4th Cir. 1997), itself distinguished its *Cromer* case from *Wood* because the independent's filing deadline in *Wood* was much later, when "there [is] an excellent . . . indication of who the [actual] party nominees [will] be." *Id.* at 774-75. The *Wood* court even cited *Jenness*' observation that Georgia had "not fix[ed] an unreasonably early filing deadline for candidates not endorsed by established parties." *Id.* at 775 (*quoting Jenness*, 403 U.S. at 438). The Fourth Circuit's *Cromer* and *Wood* decisions are thus entirely consistent with the Ninth Circuit's decision below.

3. Finally, in *Greaves v. State Board of Elections of North Carolina, et al.*, 508 F.Supp. 78 (E.D.N.C. 1980), a North Carolina district court struck down an election law on two grounds: (1) the petition signature requirement for independent candidates, in the amount of ten percent of voters in the last gubernatorial election (amounting to 160,000 signatures), was *sixteen times* the signature requirement (10,000 signatures) required to form a political party or to participate in the presidential preference primary; and (2) the early filing deadline for independent candidates, which pre-dated the *primary* election, *id.* at 82, just as in *Cromer*.

In the present case, the petition requirement of **one percent** is clearly below the ten percent requirement struck down in *Greaves*, or even the five percent requirement upheld by this Court in *Jenness*.

And in this case, unlike in the *Greaves* or *Cromer* situations, the independent's filing deadline likely *post*-dates the presidential party nominating conventions, thus making it even easier to obtain signatures due to the then-fewer party candidates in the running, and late-emerging issues having arisen. Additionally, in the State of Hawaii, the requirement that independent candidates submit a greater number of petition signatures is, as previously discussed, more than offset by (1) the over 5 month later deadline for an independent candidate to gather the necessary signatures, and (2) the difficult burden, not applicable to independent candidates, it takes to actually establish a political party, *and* become the chosen candidate, among potentially many other contenders, of that party.

### D. The State of Hawaii's Laws Do Not Operate In Tandem To Severely Burden Constitutional Rights

If, as petitioners contend, this Court must analyze the constitutionality of Hawaii's petition signature requirement for independents in tandem with other Hawaii election laws, the validity of the signature requirement becomes even more certain. *See Storer*, *supra*.

1. In *Storer v. Brown*, 415 U.S. 724 (1974), this Court reviewed a California five percent signature requirement that is entirely distinguishable from the five percent signature requirement in *Jenness*, and the one percent signature requirement at issue here. The California law required independent candidates

to file a petition signed by at least five percent of the voters who cast votes at the last general election, *but did not vote in the primary*. *Storer*, 415 U.S. at 739. As this Court recognized, the disqualification of *all* primary voters from signing the petition operated to increase the signature requirement to "substantially more than 5% of the eligible pool" – a requirement "in excess, percentage-wise, of anything the Court has approved to date as a precondition to an independent's securing a place on the ballot." *Id.* In *Storer*, then, unlike in *Jenness* or the present case, it was the specific juxtaposition of a separate, California-specific law – a law that (in disqualifying primary voters) increased an independent candidate's effective petition signature requirement to way over five percent – that raised constitutional concerns.[9]

2. In this case, consideration of the "totality" of Hawaii's election laws only lessens the relative burden on independent candidates vis-à-vis political party candidates. As discussed *supra*, the difference between the petition signature requirement of 3,711 (for independent candidates to access the ballot) and 677 (for the formation of a qualified state political party) is more than offset by: (1) the over five month later deadline for an independent candidate to gather

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[9] Despite the perceived tandem effect of the primary voter disqualification law upon the five percent petition signature requirement, this Court chose *not* to automatically strike down the California law, but to remand for further proceedings "to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates." *Id.* at 738.

the necessary signatures for the independent candidate's ballot access, which includes the time period after the presidential party candidate selection process, when it likely is easier to obtain signatures for independent candidates due to the much fewer general election choices available (the party's selection process having eliminated many candidates), and late-emerging issues having arisen; and (2) the difficult burden, not applicable to independent candidates, to actually establish a political party, Haw. Rev. Stat. § 11-62, *and* become the chosen candidate, among potentially many other contenders, of that party, Haw. Rev. Stat. § 11-113(c)(1).

## IV. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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